Supreme Court, U.S.
FILED
JUN 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1913

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. SMITH, JR.

and

JULIA C. SMITH,

Petitioners,

v.

CITY OF BRENHAM, TEXAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether a landowner's inverse condemnation suit complaining of an unconstitutional taking by a proposed landfill is premature when brought during the pendency of the state administrative process that will determine whether the state will grant a permit for the landfill, before the state has granted a permit to operate the landfill, before the landfill has been constructed or operated, and before the landowner has sought compensation through state inverse condemnation procedures.

NOTICE REQUIRED BY RULE 28.1

The City of Brenham is a municipal corporation; Rule 28.1 is not applicable in this case.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Brenham respectfully requests that this Court deny the petition for writ of certiorari for the reasons stated below.

STATEMENT OF JURISDICTION

Respondent does not dispute the jurisdiction of this Court.

STATEMENT OF THE CASE

This is an inverse condemnation case, which Petitioners brought in the United States District Court for the Western District of Texas seeking damages and an injunction under federal and state law. Petitioners complained of a proposed landfill, which is to be operated on property owned by the City across a road from Petitioners' property if the Texas Department of Health grants the City of Brenham a permit to operate the landfill. It is undisputed that at all times relevant to this lawsuit the landfill of which Petitioners complain has been a mere future prospect and the subject of a contested administrative proceeding in the Texas Department of Health. In the administrative proceeding Petitioners are opposing the City's application for a permit and at the same time are prosecuting this litigation.

The complaint filed by Petitioners, which is attached as a part of the appendix to their petition, demonstrates that they did not complain about any alleged delay, extraordinary or otherwise, or bad faith in the district court. Petitioners sought an injunction to prohibit operation of the landfill, and they sought damages for the "taking" that they claim occurred when the City announced its intention to locate the landfill across the road from Petitioners' property and made application for

a permit from the state. The complaint demonstrates conclusively that Petitioners alleged that the proposed operation of the landfill would effect a taking, and they sought to enjoin the location and operation of the landfill.

The City moved to dismiss Petitioners' claims on the ground that the claims were not ripe for adjudication, and the district court agreed. By its orders of June 2, 1988, and September 14, 1988, the district court held that Petitioners' claims were premature and dismissed the claims without prejudice. There were two independent bases for the district court's decision: the lack of final agency action by the state agency charged by Texas law with determining whether and how the landfill would be operated and Petitioners' failure to seek compensation through Texas inverse condemnation procedures. The United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal. *Smith v. City of Brenham*, 865 F.2d 662 (5th Cir. 1989).

As of the date of this brief, Petitioners continue to use the property in Brenham, Texas, as a residence, and the City has not begun to construct and is not operating the landfill at issue. Petitioners continue to oppose the City's application for a permit from the Texas Department of Health, are conducting discovery in that administrative proceeding and have requested a public administrative hearing to contest the proposed landfill. Under Texas law Petitioners are entitled to a public hearing on the permit application, which can include land use issues affecting the City's property and their property. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 4(e); 19 TEX. ADMIN. CODE §§ 325.61-.62; 325.93-.94.

REASONS THE WRIT SHOULD BE DENIED

The decision below was based on well-settled principles of federal law and does not present a novel or an important federal question for this Court. Petitioners' "extraordinary delay" theory, which was raised for the first time in the Court of Appeals, is based upon an inapposite footnote in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) and should not be a reason for granting the petition. The *Agins* footnote concerns whether preliminary activity by the government constitutes a "taking," and Petitioners misperceive the grounds for the dismissal of their claims. They did not allege extraordinary delay or bad faith in their complaint, and the district court did not dismiss the claims for failure to state a claim for a taking. The issue in this case is ripeness.

Petitioners' claims will not be ripe for adjudication until there is final agency action on the City's application for a permit to operate the landfill. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In addition, Petitioners' claims will not be ripe until the State of Texas denies compensation for any taking which Petitioners contend occurred. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Texas law provides an adequate remedy to compensate for a taking or damaging of property by the government if the claim is ripe for adjudication. *E.g.*, TEX. CONST. art. I, § 17; *City of Abilene v. Burk Royalty Company*, 470 S.W.2d 643 (Tex. 1971). Thus, for the two independent reasons relied upon below, dismissal of Petitioners' claims for lack of ripeness

is correct because the landfill at issue has not been permitted, has not been constructed, is not being operated and the state administrative proceeding to determine whether the landfill will ever be operated is ongoing.

Petitioners' belated "extraordinary delay" argument is disingenuous and is not a reason to grant the petition. First, this argument seeks to establish that a taking occurred from the pendency of the state administrative proceeding rather than that the claim is ripe for adjudication. Moreover, it is patently clear that on the facts of this case delay does not destroy all economically viable use of Petitioners' land but instead postpones the City's operation of the landfill and the parade of horribles which Petitioners predict will occur. *Smith v. City of Brenham*, 865 F.2d 662 (5th Cir. 1989). Petitioners are seeking a permanent delay of the landfill through the administrative process and the courts. This is not a case in which a landowner's proposed development or use of property is being prevented by governmental delay; the governmental decisionmaking involves only nearby property owned by the City, and any delay prevents the very use by the City that Petitioners seek to enjoin in this litigation.

The City's proposed landfill is a mere future prospect which may or may not occur, and this Court has made clear that preliminary activity by the government does not effect a taking. *E.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980) and cases cited therein. Bad faith extraordinary delay may be relevant to determine the period for which compensation may be due from a taking, but the taking claim must first become ripe for adjudication. *See First English Evangelical Lutheran Church v. County of Los*

Angeles, ___ U.S. ___, 107 S.Ct. 2378, 2389 n.10 (1987). *Accord, Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988). Petitioners did not allege either bad faith or extraordinary delay in the district court and cannot dispute that they are litigating actively in the administrative proceeding. Finally, because Petitioners' property is outside the area to be used by the City for its proposed landfill, even Petitioners' taking theory is not well founded. *See Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784 (8th Cir. 1979). Neither *Agins* nor *First English* is a ripeness case, and neither supports granting the petition for writ of certiorari in this case.

CONCLUSION

The petition for writ of certiorari is based on an allegation that was not presented to the district court, and it ignores the ripeness issue completely. Petitioners argue that they have stated a claim for a taking but do not address the ripeness issue. Well-settled law of this Court, which was followed below, compels the conclusion that Petitioners' claims are not ripe for adjudication and that there has not been a taking. There has been no final action by the Texas Department of Health on the City's application for a permit to operate the landfill at issue, Petitioners can contest and are contesting the permit application in the state administrative proceeding, Petitioners will receive a public hearing in the administrative proceeding on all issues related to the landfill, including land use, and Petitioners have an available remedy through state inverse condemnation procedures if they

are dissatisfied with the result in the administrative proceeding. Moreover, the land proposed to be used as a landfill is merely in proximity to Petitioners' property, and they are using their property as a residence during the pendency of the administrative proceeding. Petitioners seek to have the federal courts interfere in an ongoing state administrative proceeding, in which they are active litigants, simply because they believe the process has taken too long. Neither the federal courts nor the state courts should do so.

There are no important questions of federal law presented by this case, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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